RECOVERY FOR INDIRECT INJURY CAUSED BY ACTION ON A THIRD PERSON. — Although sometimes disputed and frequently ignored,[1] it is a fundamental principle of the law of torts that intentional harm, unless justified, is actionable.[2] The failure clearly to recognize this principle apparently accounts for some confusion of reasoning in a recent case, in which a wife was denied recovery for loss of her husband's *consortium* and support against a defendant who first induced the husband to commit a crime, and then secured his conviction. *Nieberg* v. *Cohen*, 92 Atl. 214 (Vt.).[3] The court implies that it would have allowed recovery if there had been "intent to injure the wife," by which it apparently means if the act had been inspired by hostility to the wife. A few cases may support this distinction,[4] but it seems unsound and apparently arises from a confusion of motive and intent.[5] Harm is no less intentional when the tortfeasor merely knows that it will result from his act, than when his motive also is to inflict the harm.[6] But motive is an important factor in determining whether or not there is justification; or better, a bad motive may avoid an otherwise sufficient justification.[7] It is submitted, however, that if the act is a legal wrong to the third person, there can never be justification as to the plaintiff, and facts showing justification and motive are alike immaterial.[8] But where the act is not a wrong to

as to the *cestui* the statute had not begun to run. Such a result is a powerful argument against the doctrine for which it stands.

[1] Boyson *v.* Thorn, 98 Cal. 578, 33 Pac. 492; Bourlier Bros. *v.* Macauley, 91 Ky. 135, 15 S. W. 60; Ashley *v.* Dixon, 48 N. Y. 430. A failure to grasp this principle is evident in the opinions of Lord Watson and Lord Herschell in Allen *v.* Flood, [1898] A. C. 1, 96, 118. See also the dissenting opinions in Lumley *v.* Gye, 2 E. & B. 216, 246; and Bowen *v.* Hall, 6 Q. B. D. 333, 342.

[2] Walker *v.* Cronin, 107 Mass. 555; Beekman *v.* Marsters, 195 Mass. 205, 80 N. E. 817; Hughes *v.* McDonough, 43 N. J. L. 459; Angle *v.* Chicago, St. P., M. & O. R. Co., 151 U. S. 1; Tarleton *v.* McGawley, Peake N. P. Cases, 205; Quinn *v.* Leathem, [1901] A. C. 495, 510; South Wales Miners' Federation *v.* Glamorgan Coal Co., Ltd., [1905] A. C. 239. See also Bowen *v.* Hall, *supra*, 337; Vegelahn *v.* Guntner, 167 Mass. 92, 105, 44 N. E. 1077, 1080.

[3] A more complete statement of the facts of this case appears in RECENT CASES, p. 530. At common law a wife could not sue for loss of *consortium*, but under modern statutes enabling a married woman to sue in her own name, there seems no reason for refusing such an action, and ordinary general tort principles should apply. Flandermeyer *v.* Cooper, 85 Oh. St. 327, 98 N. E. 102. For a discussion of this question see 26 HARV. L. REV. 74.

[4] See McNary *v.* Chamberlain, 34 Conn. 384; Gregory *v.* Brooks, 35 Conn. 437; McCann *v.* Wolff, 28 Mo. App. 447; Jones *v.* Stanly, 76 N. C. 355.

[5] This confusion arises largely from the continual use of the word "malice" with every shade of meaning from intent to the worst kind of evil motive.

[6] This proposition must not be confused with the unsound but common statement that "every person is presumed to intend the reasonable consequences of his own act."

[7] An analogy to libel and slander is suggested. Justification, which may be the mere exercise of a legal right or competition, is analogous to privilege, and as malice avoids the privilege, so bad motive may avoid the justification. For a discussion of what may constitute justification, see Mogul Steamship Co. *v.* McGregor, Gow & Co., [1892] A. C. 25.

[8] The following example may explain the suggested distinction. If the defendant persuades a third party to refrain from entering into a contract with the plaintiff, competition may justify the injury to the plaintiff. But if, under the same conditions of competition, the defendant prevents the third party from entering into the contract by falsely imprisoning him, he should not be justified. This distinction is not expressly laid down in the cases, but it is submitted that it is sound and in accord with the decisions.

the third person,[9] then the injury to the plaintiff may be justified, and evidence of such justification and of motive are material.[10] Applying these principles to the present case, it appears that the important question to determine is whether the criminal conviction of the husband is sufficient justification for the injury to the plaintiff. This the court fails to discuss, although the result which it reaches seems correct.[11]

A somewhat different situation exists where the injury to the plaintiff is not intentional but might reasonably have been foreseen. Justification aside,[12] it would seem to make no difference in this class of cases whether the act to the third person be intentional or negligent. In this connection another recent case is interesting, which allowed recovery for loss by fire from a defendant who negligently ran over a fire company's hose and so prevented them from extinguishing the fire. *Birmingham, E. & B. R. Co.* v. *Williams*, 66 So. 653 (Ala.).[13] It is to be noticed that in this case the ultimate injury is to specific property and not to the plaintiff in his business relations. In the latter class of cases recovery is apparently not allowed.[14] Although difficult to support in theory, such a distinction is not difficult of explanation. Because of the historical importance of the old idea of trespass, the law has continued to be more ready to protect person and property from interference than the less definite but equally valuable rights arising from relations with others. This tendency has been strengthened by a dread of greatly increasing litigation and a distrust of the competency of juries to deal with questions involved.[15] But since all courts now allow recovery for intentional injuries to pecuniary substance,[16] it does not seem justifiable to revive the historical distinction in these cases where there is a negligent

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[9] As persuading the third person to break a contract.

[10] See an article by Dean Ames in 18 HARV. L. REV. 411. Mere good motive is not of itself a justification, however. See South Wales Miners' Federation *v.* Glamorgan Coal Co., Ltd., *supra*, where recovery was allowed for inducing a breach of contract, although the motive was indirectly to benefit the plaintiff employers.

[11] There would seem to be sufficient justification, and since there is no bad motive towards the plaintiff, there should be no recovery. But whether or not all the defendant's acts were covered by the justification is a question of fact, which requires a more thorough knowledge of the evidence for determination.

[12] The same principles as to justification should apply in these cases, as where the harm to the plaintiff is intentional. Therefore, where there is an intentional or negligent wrong to the third person, justification as to the plaintiff should not be possible. But where the act to the third person is lawful, a sufficient justification for an intentional injury to the plaintiff would *a fortiori* be sufficient for a negligent injury.

[13] The facts of this case are more completely stated in RECENT CASES, p. 525.

The following cases are nearly identical in their facts: Accord, Tutwiler Coal, Coke & Iron Co. *v.* Nail, 141 Ala. 374, 37 So. 634; Houren *v.* Chicago, M. & St. P. Ry. Co., 236 Ill. 620, 86 N. E. 611; Little Rock Traction & Electric Co. *v.* McCaskill, 75 Ark. 133, 86 S. W. 997; Metallic Compression Casting Co. *v.* Fitchburg, R. Co., 109 Mass. 277. *Contra*, Mott *v.* Hudson River R. Co., 1 Robt. (N. Y.) 585. The fact that in these cases the injury at first glance seems direct, and not through interference with the action of third persons, the fire company, may explain why the courts have so readily allowed recovery.

[14] Connecticut Mutual Life Ins. Co. *v.* New York & N. H. R. Co., 25 Conn. 265; Byrd *v.* English, 117 Ga. 191, 43 S. E. 419; Anthony *v.* Slaid, 11 Metc. (Mass.) 290; Davis *v.* Condit, 124 Minn. 365, 144 N. W. 1089; Dale *v.* Grant, 34 N. J. L. 142. But see Cue *v.* Breeland, 78 Miss. 864, 29 So. 850.

[15] See an article by Professor Pound in 28 HARV. L. REV. 343, 355.

[16] Walker *v.* Cronin, *supra;* Quinn *v.* Leathem, *supra.*

injury through action on a third person. A further possible line of distinction is between the cases where the injury to the plaintiff is intentional, and where it is only negligent. Broadly speaking, this is apparently the line which limits liability under the present state of the law. To allow recovery for an injury intentionally caused, but not for the same injury negligently caused, is not unheard of in our law.[17] An example is the refusal of some courts to allow recovery for injury caused by mental shock negligently inflicted by the defendant.[18] Here again there is no logical basis for the distinction, but the courts are influenced by the policy against multiplicity of litigation and the practical difficulties of procedure. But this produces the unfortunate result of allowing undoubted injuries to go without redress.[19]

It would seem to be a far better rule to allow recovery for all unjustified injuries caused by influencing the action of a third party, whether intentional or only the natural and probable result of an intentional or negligent act. The fact that occasional cases do allow recovery for such indirect injury to property indicates that here as in other parts of the law the modern tendency is towards a broadening of tort liability.[20] The suggested rule does not in any way increase the duty imposed on a person in respect to his actions. Every person now must act with reasonable prudence, and no increase in the degree of prudence required, nor in the kind of action in which one must exercise prudence is involved. It only imposes liability for an additional kind of injury, which is not new but which is recognized as actionable by the law in other circumstances. This does not seem to be too great a liability to impose upon the defendant, and it is certainly more just that he should be compelled to pay for the reasonably foreseeable injury which he has caused, than that the injured party should bear the loss.

RECENT CASES

ANIMALS — DAMAGE TO PERSONS BY ANIMALS — INJURY TO YOUNG CHILD IN CONSEQUENCE OF NEGLIGENCE OF CUSTODIAN. — The plaintiff, a child three years old, negligently attended by her grandfather, put her arm through the bars of a cage at the defendant's zoölogical garden, and was bitten by a "wild ass of Asia" confined therein. There was no proof that the defendant was negligent or that it had knowledge of the vicious propensity of the animal.

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[17] For instance, the action of deceit, although there is no liability for negligent language.

[18] Recovery is allowed where the shock is intentional. Wilkinson *v.* Downton, [1897] 2 Q. B. 57. But it is not allowed everywhere where the act is negligent and there is no physical impact. Spade *v.* Lynn & Boston R. Co., 168 Mass. 285, 47 N. E. 88.

[19] This will be true in all cases where the act of the third party is lawful, or where, being under no duty to act, he refrains from acting.

[20] An instance of this is the right of privacy. Pavesich *v.* New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68. Also the suggested liability for negligent language, which has been adopted in New Hampshire. See an article by Professor Jeremiah Smith in 14 HARV. L. REV. 184; Cunningham *v.* Pease House Furnishing Co., 74 N. H. 435, 69 Atl. 120.